SOCIAL SECURITY ACT
42 USCS §422(c)

"Period of trial work" defined.

(1) The term "period of trial work," with respect to an individual entitled to benefits under section 223, 202(d), 202(e) or 202(f) [42 USCS §423, 402(d), (e), or (f)], means a period of months beginning and ending as provided in paragraphs (3) and (4).

(2) For purposes of sections 216(i) and 223 [42 USCS §§416(i), 423], any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type of normally performed for remuneration or gain.

(3) A period of trial work for any individual shall begin with the month in which becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 202(d) [42 USCS §402(d)] who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 202(e) or (f) [42 USCS §402(e), or (f)] who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work may begin for any individual prior to the beginning of the month following the month in which this paragraph is

enacted [enacted Sept. 1960]; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work.

20 C.F.R. §404.1592(a)

THE TRIAL WORK PERIOD

(a) Definition of the trial work period. The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work period in determining whether you disability ended at any time after the trial work period.

(b) What we mean by services. When used in this section, services means any activity, even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit. It you are an employee, we will consider your work to be services if in any calendar year after 1989 you earn more than $200 a month ($75 a month is the amount for calendar years 1979 through 1989, and $50 a month is the amount for calendar years before 1979), or you work more than 40 hours a month in the business in any calendar year after 1989 (15 hours a month is the figure for calendar years before 1990). We generally do not consider work to be services when it is done without remuneration or merely as therapy or training, or when it is work usually done in a daily routine around the house, or in self-care.

(c) Limitations on the number of trial work periods. You may have only one trial work period during a period of entitlement to cash benefits.

(d) Who is and is not entitled to a trial work period. (1) Those who are receiving disability insurance benefits, child's benefits based on disability and, beginning December 1, 1980, those who are receiving widows' or widowers' benefits based on disability, or surviving divorced spouses' benefits based on disability, generally are entitled to a trial work period. (2) You are not entitled to a trial work period if — (i) You are entitled to a period of disability but not to disability insurance cash benefits; or

(ii) You are receiving disability insurance benefits in a second period of disability for which you did not have to complete a waiting period. (e) When trial work period begins and ends. The trial work period begins with a month in which you become entitled to disability insurance cash benefits, to child's cash benefits based on disability or to widow's, widower's, or surviving divorced spouse's cash benefits based on disability. It cannot begin before the month in which you file your application for benefits and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earlier:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services; or (2) The month in which new evidence, other than evidence relating to any work you did during the trial work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled (see §404.1594).

[45 FR 55584, Aug. 20, 1980, as amended at 49 FR 22273, May 29, 1984; 50 FR 50130, Dec. 6, 1985; 54 FR 53605, Dec. 29, 1989]

United States Court of Appeals
For the Sixth Circuit

Nos. 97-3524; 97-3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from a Judgment of the United States District Court for the Northern District of Ohio

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EXCERPTS FROM PETITION OF U-HAUL CO. OF CLEVELAND FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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* * * *

(5th Cir. *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513, 518 1997), *petition for cert. Filed* Dec. 15, 1997. The Eighth Circuit's position is that if plaintiff receives disability payments, a court should "carefully scrutinize" the evidence and that the plaintiff's burden is "particularly cumbersome, for summary judgment should issue unless there is some strong countervailing evidence that the employ . . . is, in fact, qualified." *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997).

In short, no clear standard exists in this Circuit (or for that matter *among* the Circuits) to guide lower courts in addressing the issue of when plaintiffs' representations

preclude them from claiming, as a matter of law, they are able to perform their former jobs. This lack of a clear standard likely contributed to the present panel's misunderstanding as to whether U-Haul conceded the preclusion issue in its entirety. The panel decision should be reconsidered in light of the *Blanton* holding, which would permit judgment as a matter of law in favor of U-Haul. Additionally, en banc review is necessary to "articulat[e] broad rules" to ensure uniformity of this Court's decisions. U-Haul thus respectfully requests rehearing and suggests rehearing en banc would be appropriate as well.

B. U-Haul did not waive its argument that U-Haul was entitled to judgment as a matter of law but merely conceded *per se* judicial estoppel did not apply.

U-Haul prepared its initial brief at a time when most other courts had ruled that prior representations by plaintiffs of total disability *per se* judicially estopped their claims under the ADA. The Sixth Circuit subsequently reached this issue in *Blanton*, 123 F.3d at 917, a decision which foreclosed the use of *per se* judicial estoppel, but nonetheless used an "overwhelming weight" standard to grant the employer judgment as a matter of law.

The panel decision mistakenly states that U-Haul conceded its entire argument it was entitled to judgment as a matter of law, when it merely conceded *per se* judicial estoppel did not apply:

> "U-Haul conceded its argument concerning the applicability of judicial estoppel . . . has since been foreclosed by this court's decision in *Blanton v. Inco Alloys Int'l Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and

Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998). (Panel Op. At 11, Ex. A.)

Instead, U-Haul only conceded that it could not prevail on the doctrine of *per se* judicial estoppel under cases such as *Blanton*, based upon plaintiff's consistent and repeated assertions of disability. (James Aff., attached at Ex. B.)

After making the concession that plaintiff was not *per se* estoppel, counsel for U-Haul had prepared to make and attempted to make the argument that, under *Blanton*, this Court examines representations of disability in granting judgment as a matter of law. Questioning by the panel, however, cut off this argument and prevented counsel from returning to it.[3] (James Aff., Ex. B.)

U-Haul argued in its Reply brief, written after *Blanton*, that *Blanton* "does not support the result plaintiff seeks in this case." (App. Reply Br. At p. 4.) *Griffith*, 135

* * * *

[3] On September 22, U-Haul's counsel contacted the Clerk of Court to request the audiotape of oral argument. Counsel was told that pursuant to this Court's new rule on obtaining audiotapes, counsel had to make a written request for such tape. Counsel was told the tape could not only be obtained in the discretion of the Chief Judge. Counsel for U-Haul did make a written request, but has not yet obtained approval to receive a copy of the tape. (James Aff., Ex. B.)

United States Court of Appeals
For the Sixth Circuit

Nos. 97-3524; 97-3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from a Judgment of the United States
District Court for the Northern District of Ohio

AFFIDAVIT OF RONALD J. JAMES,
(as attached to REPLY OF U-HAUL OF CLEVELAND TO KUNKLE OPPOSITION TO U-HAUL (sic) MOTION FOR RECALL OF MANDATE)

STATE OF OHIO	)	
	)	SS: AFFIDAVIT OF
COUNTY OF	)	RONALD J. JAMES
CUYAHOGA	)	

I, RONALD J. JAMES, being first duly sworn, depose and state as follows:

1. I am lead counsel for Defendant-Appellant U-Haul. On July 31, 1998, I presented oral argument to this Court.

2. The panel decision issued September 16, 1998, states that U-Haul "conceded that this argument concerning the applicability of judicial estoppel in this context has since been

foreclosed by this Court's decisions in *Blanton* and *Griffith*." Although U-Haul conceded that *per se* judicial estoppel no longer applied, U-Haul did not concede its entire argument that plaintiff's continued and repeated representations of disability entitle U-Haul to judgment as a matter of law.

3. In my opening remarks to the Court, I conceded that the Appellant's initial position regarding *per se* judicial estoppel effect of prior representations of disability had been foreclosed by the Court's decision in *Blanton v. Inco Alloys, Inc.*, 123 F. 3d 376 (6th Cir. 1998), *supplementing* 108 F. 3d 104 (6th Cir. 1997) and subsequent decisions, particularly *Griffith v. Wal-Mart Stores, Inc.*, 135 F. 3d 376 (6th Cir. 1998). U-Haul's position at oral argument was and continues to be that after *Blanton* and subsequent cases, there is no longer a basis for arguing that an ADA plaintiff who has made prior representations of total disability is *per se* judicially estopped; however, such plaintiff cannot escape the consequences of those prior representations. It is clear that this Court considers such representations to be material facts to be given substantial weight in analyzing whether an employer is entitled to judgment as a matter of law. I had prepared to make this argument but was foreclosed from further elaboration by the panel's questioning.

4. On September 22, 1998, I contacted the office of the Clerk of Court for the United States Court of Appeals for the Sixth Circuit to request a copy of the audiotape of oral argument conducted on July 31. I was told that pursuant to the Court's new rule on obtaining audiotapes, I would have to submit a written request.

5. On September 22, I submitted a letter requesting a copy of the tape of oral argument, as per the Clerk's instructions. I received a letter dated October 14 from the Manager of Administrative Services in the Clerk's Office

denying me my request for the audiotape without any explanations as to why.

6. Once I became actually aware of the Court's denial of our Petition for Rehearing on December 3, I resumed my efforts to acquire the audiotape. Both personally and through a firm colleague, I telephoned the Clerk of Courts. The official I spoke with told me that, because the mandate had already issued, the Court's standard procedure was to discard the tape in the trash. The official then verified that the tape I was seeking was in fact gone.

7. In the same manner, we contacted the chambers of all three judges on the panel in the hopes that one of them might still have a copy of the tape. These efforts proved likewise fruitless.

8. I continue to assert that all I stated at oral argument was the *per se* judicial estoppel was no longer a valid argument in the wade of *Blanton* and subsequent ruling, and that I never conceded anything else. I am unable to prove this assertion, however, as the Court never allowed me to gain access to the audiotape recording of oral argument.

/s/ Ronald J. James
Ronald J. James

SWORN TO BEFORE ME and signed in my presence this 16th day of December, 1998.

/s/ Marcia A. McGratty
Notary Public

Marcia A. McGratty
Attorney at Law
Notary Public- State of Ohio
My commission has no expiration date,
Section 147.03 O.R.C